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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1987

NEW MEXICO,
Petitioner,

v.

CRAIG HARRIS HENSEL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW MEXICO

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QUESTIONS PRESENTED FOR REVIEW

Whether the New Mexico Court of Appeals erred in holding that Respondent Craig Hensel's constitutional right of confrontation was violated by the admission of hearsay evidence at the suppression hearing, and that the state thereby failed to prove a valid consent search.

1. Was Respondent's right of confrontation violated by the admission of hearsay evidence at the suppression hearing?
2. Did the State satisfy its burden of proving a valid consent to search?

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CRAIG HARRIS HENSEL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW MEXICO

The State of New Mexico, Respondent, respectfully requests that this Court issue its Writ of Certiorari to the Court of Appeals of New Mexico, reversing that court's decision and affirming the judgment and sentence of the trial court.

OPINION BELOW

The opinion of the New Mexico Court of Appeals is a formal opinion, but has not yet been published. A copy is reprinted in the appendix to this petition.

STATEMENT OF JURISDICTIONAL GROUNDS

The New Mexico Court of Appeals issued its final opinion, pursuant to rehearing, on April 14, 1987. The New Mexico Supreme Court denied the state's petition for writ of certiorari on May 20, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3). This petition will be timely filed if presented on or before July 20, 1987.

CONSTITUTION, STATUTES AND RULES

U.S. Const. Amend. VI (Confrontation Clause)

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

N.M. Stat. Ann. Section 45-3-709 (1978)

Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property, except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property by the personal representative will be necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by an heir or devisee is conclusive evidence, in any action against the heir or devisee for possession thereof, that the possession of the property by the personal representative is necessary for purposes of administration. The personal representative shall take all steps reasonably necessary for the management, protection and preservation of the estate in his possession. He may maintain an action to recover possession of property or to determine the title thereto.

N.M. Stat. Ann. Section 45-3-711 (1978)

Until termination of his appointment, a personal representative has the same power over the title to property of

the estate that an absolute owner would have, subject only to his trust to use and apply the property for the benefit of creditors and others interested in the estate. This power may be exercised without notice, hearing or order of court.

N.M.R. Evid. 11-104

A. Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to the provisions of Paragraph B. In making his determination he is not bound by the Rules of Evidence except those with respect to privileges.

N.M.R. Evid. 11-1101

D. Rules inapplicable. The rules (other than those with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the judge under Rule 11-104.

STATEMENT OF THE CASE

Respondent pleaded guilty to one count of trafficking in a controlled substance by manufacturing the substance, contrary to N.M. Stat. Ann. 30-31-20 (Repl. Pamp. 1980). Prior to entering his plea, he filed a motion to suppress evidence, reserving the right to appeal from denial of that motion.

At a hearing on the motion, Officer Rogers of the state police testified that Respondent's mother, Mrs. Charlotte Hensel, consulted the state police in Roswell about the possibility of her son Craig having stolen her car. She told Officer Rogers that she believed he could be found at a premises known as the Scully Ranch in Fort Sumner. The property had belonged to her sister, who was deceased, and she, Mrs.

Hensel, was the personal representative of the estate. She told Officer Rogers that nobody had permission to be on the premises, and that Craig had probably stolen a key. She also stated that he would probably be in possession of drugs. (Tr. 10-12, 31-32, 39).

Mrs. Hensel signed an Auto Theft Affidavit form (Tr. 131) and a Form for Consent to Search (Tr. 132). Officer Rogers transmitted the information to Officer Bryant in Fort Sumner, who picked up defendants Craig and Ross Hensel. Following a telephone conversation at the police office where Officer Bryant and Ross Hensel spoke with Mrs. Hensel, and in which she again requested a search of the house, (Tr. 68-71), Officer Bryant, Sheriff Turnbow, and Craig and Ross Hensel returned to the house where a search was conducted. The search produced evidence of the manufacture of a controlled substance, methamphetamine. (Tr. 72-78). Respondent was thereafter charged by Criminal Information with one count of trafficking in a controlled substance by the manufacture of the substance.

At a hearing on Respondent's motion to suppress, Officers Rogers and Bryant and Sheriff Turnbow testified for the state, and Craig Hensel testified in his own behalf. Mrs. Hensel did not testify, but Officers Rogers and Bryant testified as to her statements, and the Auto Theft Affidavit and the Form for Consent to Search were received in evidence. (Tr. 38). Craig Hensel testified that the house belonged to him, and that he did not consent to a search. (Tr. 121-122, 125). Ross Hensel did not testify. At the conclusion of the hearing, the district court found a valid consent to search by Mrs. Hensel, and denied the motions to suppress. Respondent thereafter pleaded guilty.

On appeal, and following consolidation of the cases, the court of appeals initially affirmed. It ruled that Defendant Ross Hensel had demonstrated no legitimate expectation of

privacy in the premises, and, with respect to Defendant Craig Hensel, that Mrs. Hensel had given a valid consent to search. On Respondent's motion for rehearing, the court ordered supplemental briefs on the issue of whether common authority is required for a third-party search, and whether a third party can consent to a search when the target of the search is present.

Following supplemental briefing, the court of appeals withdrew its original opinion and substituted a new opinion. It affirmed Defendant Ross Hensel's conviction on the basis of his lack of standing. It reversed, however, as to Defendant Craig Hensel, holding that the district court erred in finding that Mrs. Hensel had authority to consent to the search. It based this holding on the premise that Officer Rogers' testimony as to what Mrs. Hensel had told him violated Respondent's right of confrontation. The issue of confrontation, while addressed in the original briefs, had not been addressed in the supplemental briefs as the court of appeals had directed briefing only on those issues specified above. (*See* Brief in Chief at 15-16; Answer Brief at 18-19).

PRESENTATION OF THE FEDERAL QUESTION BELOW

Respondent objected at the suppression hearing to the use of Mrs. Hensel's out-of-court statements, and both parties addressed the issue of confrontation in their briefs to the court of appeals. The initial opinion of the court of appeals did not address the confrontation issue, but the opinion substituted on rehearing was based on this constitutional premise. Petitioner appealed this determination to the New Mexico Supreme Court by way of Petition for Writ of Certiorari, which was denied.

BASIS FOR GRANTING THE WRIT OF CERTIORARI

The New Mexico Court of Appeals erred in holding that the admission of hearsay statements at a suppression hearing violated Respondent's confrontation rights. This holding conflicts with New Mexico Rules of Evidence 11-104(A) and 11-1101(D)(1), and with the opinions of the United States Supreme Court in *United States v. Raddatz*, 447 U.S. 667 (1980); *United States v. Matlock*, 415 U.S. 164 (1974); *McCray v. Illinois*, 386 U.S. 300 (1967); and *Cooper v. California*, 386 U.S. 58 (1967). In addition, the evidence, both with and without Mrs. Hensel's statements, supports the trial court's determination of her authority to consent.

ARGUMENT

1. Respondent's right of confrontation was not violated by the admission of hearsay evidence at the suppression hearing.

In its substitute opinion the court of appeals bypassed the issue of Mrs. Hensel's authority to consent by holding that admission of her out-of-court statements violated Respondent's right of confrontation. This holding misconstrues the nature of a suppression hearing and the applicability of constitutional rights, as determined by this Court.

A suppression hearing does not involve the question of guilt or innocence. Indeed, its function, quite apart from guilt and innocence, is the determination of whether facts, admittedly accurate, are to be used in the trial itself. *See State v. Rascon*, 89 N.M. 254, 261, 550 P.2d 266 (1976). Since it involves questions of fact preliminary to admissibility of evidence, the rules of evidence specifically sanction the reception of hearsay evidence. N.M.R. Evid. 11-104(A) and 11-1101(D)(1).

The United States Supreme Court, addressing a due process claim involved in referring a suppression hearing to a magistrate, observed the nature of a suppression hearing as follows:

> Of course, the resolution of a suppression motion can and often does determine the outcome of a case; this may be true of various pretrial motions. We have repeatedly pointed out, however, that the interests underlying a voluntariness hearing do not co-incide with the criminal law objective of determining guilt or innocence . . . .
>
> This Court on other occcasions has noted that the interests at stake in a suppression hearing are of lesser magnitude than those in the criminal trial itself. At a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial . . . . We conclude that the process due at a suppression hearing may be less demanding and elaborate than the protections accorded the defendant at the trial itself.

United States v. Raddatz, 447 U.S. 667, 677-79 (1980).

In *McCray v. Illinois*, 386 U.S. 300, 313 (1967), the Court specifically held that the Sixth Amendment right of confrontation is not violated by failure to produce an informant at a preliminary hearing. The Court relied on *Cooper v. California*, 386 U.S. 58 (1967), in which it said the contention was "absolutely devoid of merit." *Id.* at 62 n.2. Finally, in considering the admissibility of the third-party consenter's out-of-court statements about her authority to consent in *Matlock*, the Court noted that it had specifically rejected confrontation claims in *McCray*. *United States v. Matlock*, 415 U.S. 164, 174-75 (1974).

The issue was squarely presented recently in *United States v. Boyce*, 797 F.2d 691 (8th Cir. 1986). In that case, the

officer who stopped, searched and arrested the defendant, and whose observations led to a finding of probable cause, did not testify at the suppression hearing. Instead, his statements were presented through another officer who had not been present. The eighth circuit rejected the defendant's confrontation claim. Relying on *Raddatz* and *Matlock*, the court concluded that the interests involved in a suppression hearing are of a lesser magnitude than those involved in the trial itself, and that the right of confrontation does not apply to the same extent. *Id.* at 693; *cf. United States v. Merritt*, 695 F.2d 1263, 1269 n.10 (10th Cir. 1982), *cert. denied*, 461 U.S. 916 (1983) (hearsay establishing reasonable suspicion admissible at suppression hearing); *United States v. Lee*, 541 F.2d 1145, 1146 (5th Cir. 1976) (same rule with respect to probable cause determination).

The cases cited by the court of appeals in its substitute opinion do not compel a different result. None of the cases involved a suppression hearing. The case of *State v. Mascarenas*, 80 N.M. 537, 458 P.2d 789 (1969) concerned a preliminary hearing in which the objectives were far different from those of a suppression hearing. Three cases cited by the court of appeals all involved evidence at the trial itself: *State v. Self*, 88 N.M. 37, 536 P.2d 1093 (Ct. App. 1975); *McClean v. State*, 482 A.2d 101 (Del. 1984); *State v. Adrian*, 453 P.2d 221 (Haw. 1969). The case of *State v. Asbury*, 701 P.2d 1189 (Ariz. Ct. App. 1984), involved a sentencing hearing, and the defendant was denied cross-examination of victims who actually testified. The case of *State v. Wilson*, 443 A.2d 252 (N.J. Law Div. 1981), does not support the contention of the court of appeals.

The state also contends that the purposes of confrontation were, in any event, satisfied in this case. This Court recently held in *Lee v. Illinois*, 476 U.S.__, 90 L.Ed.2d 514, 527-28 (1986) that confrontation concerns may be satisfied if the statement at issue bears sufficient indicia of reliability.

The properly admitted evidence, completely apart from Mrs. Hensel's out-of-court statements, supports the trial court's findings. It was the state's burden to prove a valid consent to search. The precise issue involved was Mrs. Hensel's authority to consent. This was established by the court's taking judicial notice, without objection, of her status as personal representative. Respondent claims that this authority alone was insufficient in light of his claim of possession of the premises. Craig's own testimony was inconclusive and conflicting. While he claimed his mother had given him the property, he produced no deed, lease, or other indicia of title. He testified to fixing the place up, but specified only boarding up the pump house. He admitted that he occupied the premises only on a sporadic basis, maintaining a separate residence in Roswell, that he received no mail at the premises and paid no utility bills. He admitted that the estate took care of the utilities and that Mrs. Hensel had had the electricity turned on. (Tr. 122-24). In light of his admissions concerning his mother's authority and the inconclusive evidence of his own authority, the court was not required to believe his testimony that he had permission to occupy the property. *Medler v. Henry*, 44 N.M. 275, 283-84, 101 P.2d 398 (1940); *Strickland v. Roosevelt County Rural Elec. Coop.*, 99 N.M. 335, 341-42, 657 P.2d 1184 (Ct. App. 1982), *cert. denied*, 463 U.S. 1209.

Independent evidence also supported Mrs. Hensel's claim of authority. (Answer Brief at 3). Officer Bryant testified that the house was abandoned. He further testified that while it was obvious someone was in it, he would not say it was being used as a permanent residence. (Tr. 62-63, 75). Sheriff Turnbow testified that nobody had lived in the house for five or six years. He stated that while somebody was occupying the house, they were not living there. (Tr. 112-115). These independent statements based on personal observations of the witnesses, together with Craig's admissions concerning the

estate's authority and his equivocation about his own authority, serve as indicia of reliability supporting Mrs. Hensel's out-of-court statements.

2. The state satisfied its burden of proving a valid consent to search.

The state bears the burden of proving a consent to search. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973); *State v. Kennedy*, 80 N.M. 152, 154, 452 P.2d 486 (Ct. App. 1969). When consent to search is obtained from a third party, the state must show that the third party had authority to consent. The Supreme Court addressed this issue in *United States v. Matlock*, 415 U.S. 164 (1974), and held that the state "may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *Id.* at 171. In a footnote, the Court further explained the meaning of "common authority" as resting on "mutual use of the property by persons generally having joint control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *Id.* at 171 n.7.

Matlock thus established two bases for third-party consent: those co-inhabitants with common authority, and those persons with other sufficient relationship to the premises. In *State v. Madrid*, 91 N.M. 375, 574 P.2d 594 (Ct. App. 1978), the New Mexico Court of Appeals was concerned with the second basis, since the evidence did not show that the consenter was a co-inhabitant with common authority. Instead, the court held that the estranged wife of the defendant possessed other sufficient relationship to the premises by virtue of her statutory right to be on the premises, her possession of a key, and her use of the premises in leaving property there. *Id.* at 378.

In the present case, Mrs. Hensel had a statutory right to possession of the premises. Without objection, the court took judicial notice of the records in the probate case of Mrs. Hensel's sister, in which Mrs. Hensel was appointed personal representative of the estate. (Tr. 42). Pursuant to Section 45-3-709 N.M.S.A. (1978), the personal representative has a right to possession of the premises. Section 45-3-711 provides that the personal representative has the same power over the title to the property as would an absolute owner. The court of appeals has held that these provisions of the probate code not only confer a right of possession on the personal representative, but impose a fiduciary duty to take possession of the property, protect it, and account for it. *Bowman v. Butler,* 98 N.M. 357, 360, 648 P.2d 815 (Ct. App. 1982).

Pursuant to New Mexico probate law, Mrs. Hensel had authority over the property, and under *Madrid*, this authority constituted "other sufficient relationship to the premises" to authorize consent to search. That Craig Hensel claimed the property was his does not compel a different result since conflicts in the evidence are for the trial court. *State v. Bloom,* 90 N.M. 192, 194, 561 P.2d 465 (1977). Mrs. Hensel disputed her son's right to be there. This distinguishes *Stoner v. California,* 376 U.S. 483 (1964), and *Chapman v. United States,* 365 U.S. 610 (1961), in both of which the defendant was a legitimate, undisputed lessee of the premises. In its initial opinion, the court of appeals correctly held that the evidence supported a finding of Mrs. Hensel's authority to consent.

Finally, the state contends that any error was harmless. Assuming that Respondent's confrontation rights were violated, the remaining evidence was sufficient to support the trial court's finding of Mrs. Hensel's authority. The uncontested evidence of her status as personal representative, the equivocal statements by Craig, and the testimony of Officers

Bryant and Turnbow were sufficient to satisfy the state's burden in the suppression hearing.

CONCLUSION

Petitioner requests this Court to grant the Petition for Writ of Certiorari, reverse the judgment of the New Mexico Court of Appeals, and affirm the judgment of the trial court.

Respectfully submitted,

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July 20, 1987

APPENDIX

IN THE COURT OF APPEALS OF
THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff-Appellee,
vs.
CRAIG HARRIS HENSEL and
ROSS JOSEPH HENSEL,
Defendants-Appellants.

Nos. 9088 & 9189
Consolidated

APPEAL FROM THE DISTRICT COURT
OF DE BACA COUNTY
STANLEY F. FROST, Judge
(Filed April 14, 1987)

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Exhibit A

OPINION

GARCIA, Judge.

We granted defendants' motion for rehearing to reconsider the issue of whether more than mere ownership is required for a third party to validly consent to a warrantless search. As a result of the rehearing, we withdraw our opinion filed January 8, 1987 and substitute the following.

Defendants, Craig Hensel (Craig) and Ross Hensel (Ross), appeal the trial court's order denying their motions to suppress physical evidence obtained as a result of an allegedly illegal search and seizure. Both pled guilty to manufacturing a controlled substance following the trial court's denial, but expressly reserved the right to appeal the orders. On the state's motion, we consolidated the cases for appeal. Because the confrontation issue is dispositive of Craig's appeal, we do not address the remaining issues argued by him. We reverse his conviction for the reasons that follow. The disposition of Ross' appeal, however, differs from Craig's. Because we find that Ross does not have standing to challenge the illegal search and seizure, we affirm his conviction.

FACTS

Craig and Ross Hensel are brothers. Along with two other co-defendants, they were arrested following the warrantless search of a house located on the Scully Ranch (Ranch). The police officers conducted the search pursuant to defendants' mother's (Mrs. Hensel) consent. Mrs. Hensel is the personal representative of the estate of which the Ranch is an asset. It is undisputed that Mrs. Hensel has never lived in the house or otherwise used the premises for any purpose.

Officer Rogers testified that Mrs. Hensel came to the state police headquarters in Roswell claiming that Craig had stolen her car and requested assistance in recovering it. Mrs. Hensel

indicated that the car could probably be found on the Ranch property where she believed Craig was staying. Mrs. Hensel also told Officer Rogers that Craig would probably be in possession of illegal drugs. She signed an affidavit and a consent to search form, granting the police permission to enter the property to search for the car and drugs. The Ranch is located in the Fort Sumner area, some eighty-seven miles from Roswell. Officer Rogers testified Mrs. Hensel told him the Ranch was abandoned; that Craig did not have permission to be on the property; and that Craig had probably stolen the key to the house from her. Mrs. Hensel did not testify at the hearing.

Craig testified that his mother had given him the Ranch as his share of the estate. He also testified that he resides at the house on a sporadic basis, has items of personal property in the house and has performed repairs and maintenance on the house and surrounding out-buildings. He admitted that he receives no mail at the Ranch and the estate pays all utility bills.

Ross did not testify at the hearing and there is no indication in Craig's testimony that Ross had his mother's or Craig's permission, explicit or implicit, to reside at or otherwise occupy the house. There was no evidence of any kind indicating that Ross was in fact residing at or otherwise occupying the house.

Defendants challenge the admission of Officer Rogers' testimony concerning Mrs. Hensel's statements on the grounds of inadmissible hearsay. They argue that Mrs. Hensel's out-of-court statements concerning her authority to consent were neither reliable nor credible and that she had a motive to lie to Officer Rogers, i.e., she wanted the police to get her car from Craig and to secure the removal of Craig from the house. The trial court admitted Officer Rogers' testimony on the assumption that it was offered to show Officer Rogers' state of mind and not to prove the truth of the matters asserted.

At the conclusion of the hearing, the trial court stated that "[t]he resolution of this matter depends upon a determination as to whether or not we have a valid consent to search the [Ranch] home." The trial court subsequently found that Mrs. Hensel had the authority to validly consent to the warrantless search and that neither Craig nor any of the other defendants arrested at the Ranch had "exclusive use of the property." The trial court based its findings of valid authority to consent in Mrs. Hensel on the fact that, as personal representative of the estate, she stood in the position of an owner.

DISCUSSION: ROSS' APPEAL

A defendant may claim the benefits of the exclusionary rule only if he demonstrates a violation of his fourth amendment rights. *See State v. Donaldson,* 100 N.M. 111, 666 P.2d 1258 (Ct.App.1983). Here, Ross failed to show at the suppression hearing that he had a legitimate expectation of privacy in the premises searched. *See State v. Waggoner,* 97 N.M. 73, 636 P.2d 892 (Ct.App.1981). A person who is aggrieved by an illegal search and seizure only through the introduction of evidence secured by a search of a third person's premises or property has not suffered an infringement of his fourth amendment rights. *Id.* Mere presence is insufficient to give rise to a legitimate expectation of privacy in the premises. *Id.* (citing *Rakas v. Illinois,* 439 U.S. 128 (1978)). Since Ross did not enjoy a legitimate expectation of privacy in the premises searched, we affirm the court's denial of his motion to suppress. *State v. Beachum,* 83 N.M. 526, 494 P.2d 188 (Ct.App.1972) (trial court will be affirmed on appeal if right for any reason).

CRAIG'S APPEAL

As opposed to the situation in Ross' case, the resolution of Craig's motion to suppress depends upon a determination of whether Mrs. Hensel, as a third party, could consent to the warrantless search of the house. *See United States v. Matlock,*

415 U.S. 164 (1974); *State v. Madrid*, 91 N.M. 375, 574 P.2d 594 (Ct.App.1978). The trial court found that the state made a sufficient showing that Mrs. Hensel had authority to consent to the search. We disagree.

The mere fact that Mrs. Hensel stands in the position of an owner of the Ranch is, in itself, not sufficient to support a finding that she had the authority to consent to the warrantless search of the premises. The authority which justifies third party consent does not rest upon the law of property, but rests rather on the mutual use of the property by persons generally having joint access or control. *United States v. Matlock*, at 171, n.7 (1974) (citing *Chapman v. United States*, 365 U.S. 610 (1961)); *Stoner v. California*, 376 U.S. 483 (1964); *State v. Madrid*. The only other evidence presented to support a finding that Mrs. Hensel had the authority to consent was the testimony of Officer Rogers, which was based exclusively on the out-of-court statements of Mrs. Hensel.

Defense counsel objected to Officer Rogers' testimony concerning statements made to him by Mrs. Hensel. The trial court initially overruled the objection and allowed Officer Rogers to testify. As the officer continued to relate statements made to him, defense counsel again objected on the grounds of hearsay and that defendant was being deprived of the right of confrontation.

We agree with the state's argument that the Rules of Evidence are inapplicable to suppression hearings, *see* SCRA 1986, Rule 11-1101(D)(1), since hearings on motions to suppress require the "determination of questions of fact preliminary to admissibility of evidence." J. Weinstein, *Federal Rules of Evidence – A Judge's View*, 174 N.Y.L.J. 1, 4 (1975), reprinted in H. Gilmore, *Evidence*, at 1-14 (1973). This view, however, does not answer defendant's contention that the statements are still inadmissible. In addition to the hearsay objection, defendant raised a sixth amendment confrontation claim.

The fact that the statements were not barred by the Rules of Evidence does not make them *per se* admissible.

A factual issue is raised as to whether Craig was lawfully utilizing or occupying the premises. Where important facts are to be determined by the factfinder and the burden of proof is on the state, it would be fundamentally unfair to allow the state to prove such facts on purely hearsay evidence, denying the accused the opportunity to cross-examine the declarant. *Cf. State v. Asbury*, 145 Ariz. 381, 701 P.2d 1189 (App.1984); *McLean v. State*, 482 A.2d 101 (Del.1984); *State v. Wilson*, 183 N.J.Super. 86, 443 A.2d 252 (1981); *State v. Self*, 88 N.M. 37, 536 P.2d 1093 (Ct.App.1975).

By this opinion, we do not intimate that an accused is guaranteed the right to confront all out-of-court declarants in any suppression hearing. The denial of the right of confrontation may be harmless in certain circumstances. *State v. Martinez*, 99 N.M. 48, 653 P.2d 879 (Ct.App.1982). *See also State v. Beck*, 97 N.M. 312, 639 P.2d 599 (Ct.App.1982). However, on the facts of this case, it would be fundamentally unfair to find that Craig's mother validly consented to the warrantless search, while denying Craig the opportunity to confront her in court. The mere fact that Mrs. Hensel stands in the position of an owner of the Ranch, in itself, is insufficient to support a finding that she had the authority to consent to a warrantless search of the premises. *United States v. Matlock*.

We hold that Craig was denied his constitutional right to confront the key witness against him. *See Mascarenas v. State*, 80 N.M. 537, 458 P.2d 789 (1969). As previously noted, the resolution of the motion to suppress depended upon a determination of whether or not Mrs. Hensel validly consented to a search of the Ranch house. The essential part of the case against Craig is contained in allegedly out-of-court statements made by his mother, as related by Officer Rogers. At no time did Craig

have an opportunity to cross-examine Mrs. Hensel concerning her authority to consent to a warrantless search. We are hard-pressed to find a more extreme case than this one in which an accused was denied the right of confrontation. *See State v. Adrian*, 51 Haw. 125, 453 P.2d 221 (1969).

CONCLUSION

We affirm the trial court's order denying Ross' motion to suppress and his conviction of trafficking in a controlled substance by manufacture. We reverse Craig's conviction and the order denying his motion to suppress. Craig's case is remanded to the district court with instructions to grant him a new suppression hearing and redetermine the lawfulness of Craig's occupancy of the Ranch house and Mrs. Hensel's authority to consent to the warrantless search of the Ranch property.

IT IS SO ORDERED.

/s/ Lorenzo F. Garcia
LORENZO F. GARCIA, Judge

WE CONCUR:

/s/ Thomas A. Donnelly,
THOMAS A. DONNELLY, Chief Judge

/s/ A. Joseph Alarid
A. JOSEPH ALARID, Judge